

# LEGAL SERVICES

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## MEMORANDUM

February 21, 2019

**SUBJECT:** Transfers between appropriations  
(SSSB 20; Work Order No. 31-GS1905\M)

**TO:** Senator Bill Wielechowski  
Attn: Nate Graham

**FROM:** Linda M. Bruce   
Legislative Counsel

You have asked for an opinion regarding the legality of language in SSSB 20 that allows the Office of Management and Budget (OMB) to transfer funds between all appropriations in a department.<sup>1</sup> This memorandum is a follow up to your conversation with Megan Wallace, Director of Legal Services. In short, allowing OMB to transfer funds between appropriations is almost certainly an unlawful delegation of the legislature's appropriation power, violates the separation of powers doctrine,<sup>2</sup> violates the prohibition on transfers between appropriations under AS 37.07.080(e), and likely violates the confinement clause under art. II, sec. 13, Constitution of the State of Alaska. These issues are discussed further below.

If a court is asked to review a transfer of funds between appropriations made by OMB as proposed in SSSB 20, the court would almost certainly find that the provision is an unlawful delegation of the legislature's appropriation power and a violation of the separation of powers doctrine. The legislature has the power of appropriation.<sup>3</sup> The Alaska Supreme Court has defined an "appropriation" as "the setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and no other."<sup>4</sup>

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<sup>1</sup> This language is attached to appropriations for every state department under SSSB 20.

<sup>2</sup> *Bradner v. Hammond*, 553 P.2d 1, 5 - 6 (Alaska 1976).

<sup>3</sup> Article IX, sec. 13, Constitution of the State of Alaska, prohibits expenditures from the treasury except in accordance with appropriations made by law.

<sup>4</sup> *Alaska Legislative Council v. Knowles*, 86 P.3d 891, 898 (Alaska 2004) (internal citations omitted).

The proposed language in SSSB 20 essentially overrides the legislature's power of appropriation. Under this proposal, the legislature would have the power to appropriate a specific sum of money to a department but would have no power over appropriations within that department. Thus, even if the legislature made an appropriation to a specific program or for a specific purpose within a department, OMB could transfer some or all funds from that appropriation to another program or purpose within that same department. OMB could also indirectly affect staffing levels within a program by transferring appropriated funds for a program to another purpose. However, the transfer authority does not, and cannot, grant OMB the authority to directly reduce salaries, which are set by contract for state employees who are members of collective bargaining units and by the salary schedule under AS 39.27.011 for employees who are not members of collective bargaining units. Ultimately, while a court has not previously considered this issue, a court would almost certainly find that the proposed delegation in SSSB 20 to allow OMB to transfer funds between appropriations unlawfully delegates the legislative power of appropriation and violates the separation of powers doctrine.

In addition, allowing OMB to transfer funds between appropriations violates the statutory prohibition on transfers between appropriations. The Executive Budget Act, AS 37.07.080(e), provides that "[t]ransfers or changes between objects of expenditures or between allocations may be made by the head of an agency on approval of the office [of management and budget]. Transfers may not be made between appropriations . . . except as provided in an act making the transfers between appropriations." Thus, under AS 37.07.080(e), only the legislature may transfer funds between appropriations and it may do so only by passing legislation that explicitly makes the transfers between appropriations.

The proposed transfer authority to OMB also raises an issue under the confinement clause. The legislature's power to attach intent or qualifying language to an appropriation has significant limits. In *Alaska Legislative Council v. Knowles*,<sup>5</sup> the Alaska Supreme Court established a five-part test for substantive contingencies related to appropriations:

[T]he qualifying language must be the minimum necessary to explain the Legislature's intent regarding how the money appropriated is to be spent. It must not administer the program of expenditures. It must not enact law or amend existing law. It must not extend beyond the life of the appropriation. Finally, the language must be germane, that is appropriate, to an appropriations bill. <sup>[6]</sup>

Language that falls outside this standard is unenforceable because it violates the confinement clause of the Alaska Constitution. The language in the draft bill allows

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<sup>5</sup> 21 P.3d 367 (Alaska 2001).

<sup>6</sup> *Id.* at 377.

OMB to transfer funding among appropriations, which is prohibited by AS 37.07.080(e). Accordingly, this language may be deemed to have the effect of amending existing law and go beyond what a court might allow under *Knowles*.

Note that, although unlikely, a court could find that the legislature may, in certain circumstances, expressly authorize a department to make certain limited transfers between appropriations in an appropriation bill as a condition of an appropriation. In past appropriation bills, the legislature has authorized the commissioner of the Department of Health and Social Services (commissioner) to transfer a specific amount of funds between appropriations in the Department of Health and Social Services, subject to certain restrictions. For example, the 30th Legislature, in HB 286, authorized the commissioner to transfer up to \$20,000,000 between all appropriations in the Department of Health and Social Services, except that no transfer could be made from the Medicaid Services appropriation.<sup>7</sup> HB 286 also required the Department of Health and Social Services to submit a report of transfers between appropriations to the Legislative Finance Division.<sup>8</sup>

In sum, a court is unlikely to find that the proposed language in SSSB 20 is constitutional or permissible under AS 37.07.080(e), since the broad authority granted to OMB appears to essentially override most of the legislature's power to appropriate.

If I may be of further assistance, please advise.

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<sup>7</sup> Sec. 1, ch. 17, SLA 2018. *See also* sec. 1, ch. 1, TSSLA 2017 (the legislature authorized the commissioner to transfer up to \$25,000,000 between all appropriations in the Department of Health and Social Services and required the department to submit reports of transfers between appropriations to the Legislative Finance Division).

<sup>8</sup> *Id.* The proposed language in SSSB 20 to allow OMB to transfer funds between all appropriations in a department is certainly broader than the language used in HB 286 from the 30th Legislature. An argument could therefore be made that the transfer authority in HB 286 included sufficient restraints to be constitutional and not violate AS 37.07.080(e). Nevertheless, in my opinion, the transfer authority previously granted in HB 286 also suffers from the same legal issues that the proposed language in SSSB 20 presents.